Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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OFFICE OF SECRETARY

In the Matter of:	)	
	)	
Forfeiture Policy Statement	)	
	)	CI Docket No. 95-6
and	)	
	)	
Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines	)	

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COMMENTS OF THE UNITED STATES TELEPHONE ASSOCIATION on NOTICE OF PROPOSED RULEMAKING

The United States Telephone Association (USTA) respectfully submits these comments in response to the Commission's Notice of Proposed Rulemaking in the above-captioned docket.[1] USTA is the principal trade association of the local exchange carrier (LEC) industry with over 1,000 members. USTA successfully petitioned the court to review the Commission's Forfeiture Policy Statement, on the basis that it constituted a binding rule, not a statement of policy, and thus must be submitted to notice and comment proceedings.[2]

In that case, USTA also noted that the Commission had failed to explain its disparate treatment of different classes of licensees in the forfeiture schedule, in particular the fact that common carriers, as a class, pay heavier fines than other licensees. The court did not address that issue, but instead directed the Commission to put the issue out for comment. In

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[1] In the Matter of Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines, Notice of Proposed Rulemaking, CI Docket 95-6, FCC 95-24, February 10, 1995 ("NPRM").

[2] See United States Telephone Association v. FCC, 28 F.3d 1232 (D.C. Cir. 1994), reviewing Policy Statement, Standards for Assessing Forfeitures, 6 FCC Rcd 4695 (1991), recon. denied, 7 FCC Rcd 5339 (1992), revised, 8 FCC Rcd 6215 (1993)("Forfeiture Policy Statement").

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its NPRM, the Commission re-issues the 1993 forfeiture guidelines, and seeks comment on those guidelines. In particular, the Commission seeks comment on the use of different base forfeiture amounts for similar violations in different services, NPRM, para. 4.

USTA respectfully submits that, as a general matter, forfeiture guidelines are useful and better than unguided case-by-case analysis of forfeitures. Forfeiture guidelines contain information which can deter violations of important rules by the industries affected, and can assist the Commission in developing priorities among differing violations. Certain violations may generally be more severe than others, and adding forfeiture guidelines to the rules is a helpful way of ensuring that forfeitures consistently reflect the Commission's priorities. However, no violation is no more or less severe when committed by one type of licensee than another. As such, the forfeiture guidelines should be revised to recognize this fact. Forfeiture guidelines which unnecessarily maintain disparate treatment among categories of service are arbitrary and unlawful, and more detrimental than beneficial.

I. Discriminatory Base Forfeitures Are Unlawful and Not Justified by Section 503(b) of the Communications Act or On Any Other Basis

The forfeiture guidelines proposed in the NPRM unfortunately again prescribe more severe base penalties for common carriers than for other entities committing the same infraction. This blatant discrimination is unlawfully arbitrary and capricious, as no satisfactory explanation for it exists, nor has any explanation been proffered by the Commission. Particularly where the Commission seeks to discriminate among similarly situated parties, it must enumerate the factual differences, and explain the relevance of those differences to the purposes of the Communications Act. See Melody Music, Inc. v. FCC, 345 F.2d 730 (D.C. Cir. 1965).

To the extent that the NPRM suggests any explanation at all, it appears that the Commission believes that the differing maxima described in Section 503(b) of the Communications Act evidence a legislative intent to require disparate base forfeiture amounts for common carriers. However, the existence of different ceilings for forfeiture amounts

plainly does not signal any intent to require different penalties across the board. The Commission's forfeiture guidelines adopt not differing maximum penalties, but differing base penalties. Assuming identical aggravating and/or mitigating factors, common carriers will pay higher penalties than other licensees for identical violations in all cases where the Commission adheres to the guidelines. There is no basis to presume Congress intended this discriminatory result.

The existence of separate categories of forfeitures for violations unique to common carriage, see, e.g., 47 U.S.C. §§ 202, 203(e), 205(b), 214(d), suggests that Section 503 is not intended to provide for greater penalties for common carriers due to concern with the seriousness of violations which are unique to common carriage. Moreover, the fact that consideration of the ability to pay is also in a separate section of the statute, added at the same time as the revised forfeiture maxima, suggests that Congress did not base differing statutory maxima based on a general presumption about common carriers' ability to pay. See 47 U.S.C. § 503(b)(2)(D); Pub .L. No. 101-239, Title III, § 3002(i)(2), 103 Stat. 2131 (1989). Moreover, Congress could not have made such a generalization about common carrier's ability to pay, as the same discriminatory base forfeitures would apply to a small RSA cellular providers, a mid-size local exchange operating company, a large Part 22 provider of paging services, and a very large nationwide interexchange carrier, which have substantial differences in their respective abilities to pay.

Congress also intended that the Commission take into account the nature, circumstances, extent and gravity of the violation, as well as other factors with respect to the party committing the violation, e.g. prior offenses. See 47 U.S.C. § 503(b)(2)(D). The statute does not suggest, nor could it be suggested, that there is any rational connection between the base forfeiture to which these criteria should be applied and the service at issue. Yet, the forfeiture guidelines adopt forfeiture amounts which essentially take into account only one criterion, a criteria not mentioned by Congress: the service at issue offered by the party involved. Consequently, the statute does not evince a clear intent to encourage the Commission to adopt forfeiture guidelines which impose substantially higher penalties on

common carriers for identical violations.

Most importantly, the fact that the statute contains disparate maxima cannot be read to require the Commission to adopt discriminatory forfeiture guidelines. The Commission has already demonstrated as much in the case of tower lighting and marking rules, where the Commission has elected to provide for equal base forfeiture amounts ($8,000), even though that amount varies among services as a percentage of the statutory maximum. See NPRM, p.9. The Commission equalized the penalties for these violations, which the Commission has characterized as "especially grave," see Forfeiture Policy Statement, 6 FCC Rcd 4695, because in certain cases licensees share towers. Id., 7 FCC Rcd 5339, 5340. Thus, the statute does not require that base forfeiture amounts be larger for common carriers, nor does it require that base forfeitures reflect the distinctions among services in the statute for purposes of maximum forfeitures.

As a matter of policy, the Commission's decision on tower lighting and marking makes sense. Substantially larger forfeiture amounts for common carriers than for other licensees creates no further disincentives against improper tower marking, as common carriers are no more resistant to deterrance than other services. Yet, this logic applies even where a tower is not shared, or in any event where licensees could potentially commit identical "grave" violations, e.g. misrepresentation in a license application. Nonetheless, the Commission proposes to apply base penalties which, for common carriers, are quadruple that for a broadcaster for an identical violation. This aspect of the Forfeiture Guidelines proposed in the NPRM is unsupported by either policy or the Communications Act.

There is no valid basis articulated, nor does one exist, for the discriminatory base forfeiture amounts identified in the NPRM.[3] Should the Commission adopt such provisions, in reliance on the disparate maxima in the Communications Act, the Commission must

[3] Similarly, no basis exists for incorporating differences among services into the percentage ranges utilized in the adjustment criteria. See NPRM, para. 4.

explain how the Act requires the Commission to treat common carriers more severely for identical violations. As the Court explained, "[t]he FCC cannot determine that common carriers as a class will pay heavier fines than other licensees and not explain their reasons for that position." USTA v. FCC, slip. op. at 9. Merely noting, without explanation or support, that such blatant discrimination is "consistent with the congressional intent in establishing different maxima," see Forfeiture Policy Statement, 6 FCC Rcd at 4695, simply will not do. See, e.g., Melody Music, 345 F.2d 730, 733.

II. Discriminatory Forfeitures Do Not Serve the Public Interest

The NPRM identifies three policy goals to be achieved by adoption of the forfeiture guidelines: 1) comparable treatment of similarly situated offenders, 2) clearer guidance to the public regarding the forfeitures that can be expected in response to specific violations; 3) increased administrative efficiency in determining the appropriate range of forfeitures. See NPRM, para. 3. The Commission will better serve these goals by adopting forfeiture guidelines which assess identical monetary penalties for identical violations (presuming identical levels of aggravating or mitigating factors), regardless of the service in which the violator is involved.

The Commission's proposal would not provide for comparable treatment of similarly situated individuals. For example, a party transfers control of licensed operations to a business venture, disguises the fact that the transferee is controlled by a foreign media conglomerate, and violates Section 310 of the Communications Act, 47 U.S.C. § 310(b). Assuming the violator in question is a common carrier, the base forfeiture is $80,000. However, were the violator a broadcast licensee, the base forfeiture would be only 1/4 of the common carrier forfeiture: $20,000. Yet the service in which the licensee is involved is irrelevant to the gravity of the offense in question. Where equal violations are at issue, disparate forfeitures will be applied to similarly situated individuals.

In the USTA v. FCC appeal, the Commission argued that the discriminatory forfeiture guidelines do not create an addressable harm because a discriminatory independent

enforcement decision, not promulgation of the guidelines, is needed to create any disparate harm. See, e.g., USTA v. FCC, Brief for Respondents at 14. Although the FCC now proposes to incorporate the guidelines into its rules, it again notes that the Commission is free to exercise its discretion in specific cases. NPRM, para. 2. To the extent that the Commission reserves its discretion, the forfeiture guidelines will not provide clearer guidance to the public as to what forfeitures can be expected. A small, rural telephone company has no way of knowing whether a particular violation will cost $80,000, $100,000, or nothing (because of inability to pay and/or other mitigating factors). In particular, the guidelines are not likely to provide guidance to the public inasmuch as, in individual enforcement proceedings, the Commission will need to modify substantially the forfeitures provided for in the guidelines to mitigate the discriminatory impact of the guidelines. To the extent that adoption as a rule requires the Commission to enforce the guidelines in all cases,[4] the Commission will be unable to correct cases of excessive forfeitures for common carriers.

Similar concerns suggest that while consistent enforcement may increase administrative efficiency, relying on case-by-case analysis to mitigate the impact of the discriminatory scheme created by the forfeiture guidelines will consume valuable Commission resources. To achieve administrative efficiency, forfeiture guidelines should be a tool that can be utilized expediently, on delegated authority. The Commission would achieve greater efficiency by adopting a single base forfeiture for all violations, and applying the adjustment criteria to that single amount, as the Commission has done with tower lighting and marking violations. While the result may vary as a proportion of the statutory maxima, that fact is irrelevant, and the rules are more likely to result in appropriate forfeitures in most cases. Simply put, guidelines developed on this basis are more likely to serve the Commission's goals.

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[4] See Forfeiture Policy Statement, 7 FCC Rcd at 5339, n.5 (proceeding to adopt forfeiture guidelines by rulemaking would unduly limit the Commission's discretion).

CONCLUSION

The Commission need not base its proposed forfeitures on a "percentage of the maximum" formula. To do so yields disparate results not required by the statute, without serving any of the Commission's goals. In particular, the proposed guidelines discriminate severely and unlawfully between similarly situated parties. The Commission should decline to adopt these arbitrary rules, and instead revise its proposed forfeiture guidelines to provide for identical base forfeitures for each violation.

Respectfully submitted,

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